

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0185

CAROL A. WALTERS

Appellant,

v.

FLATHEAD CONCRETE PRODUCTS, INC.,

Appellee.

ON APPEAL FROM MONTANA ELEVENTH JUDICIAL
DISTRICT COURT, FLATHEAD COUNTY

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES PRESENTED

1. Is \$3,000 for the death of a worker constitutional?

STATEMENT OF CASE

On December 14, 2006 Tim Walters (“Tim”) was crushed by a forklift and died from his injuries. His mother, Carol Walters (“Carol”), submitted a complaint in Montana’s Eleventh Judicial District Court, Flathead County, Montana, against Flathead Concrete Products, Inc. (“FCP”) for survival and wrongful death. Carol alleged that FCP was negligent and responsible for her and Tim’s damages. FCP submitted an answer. On January 19, 2009, FCP moved for summary judgment on all claims based on the Workers’ Compensation Act’s exclusive remedy rule stating that the claims did not meet the intentional exception to the exclusive remedy rule under the Act. Carol responded and conceded she could not meet the intentional exception to the exclusive remedy rule under the Act, but she also moved for partial summary judgment asserting that the exclusive remedy provision of the Workers’ Compensation Act is constitutionally invalid because in Tim and Carol’s case it violates the quid pro quo, which is the basis for the Act. On January 5, 2010, the district court heard cross-motions for summary judgment. On March 5, 2010, the district court granted FCP’s motion and denied Carol’s motion. The notice of entry of judgment was filed on March 11, 2010.

On April 9, 2010 Carol submitted her notice of appeal. Carol also submitted a Notice of Constitutional Challenge to the Attorney General of Montana.

STATEMENT OF FACTS

Tim Walters died on December 14, 2006, after he was crushed by a forklift he was operating on behalf of his employer, FCP. Or. Cross-Mot. S.J. (Mar. 5, 2010). Tim's co-worker, Herman Hopper, heard the forklift's motor briefly and then heard Tim scream. Aff. Herman Hopper ¶ 5 (Aug. 28, 2009). Hopper turned around and saw the forklift moving forward. *Id.* ¶ 6. Tim later died from his injuries. Compl. ¶ 4 (Oct. 16, 2008), Ans. ¶ 4 (Nov. 12, 2008).

The forklift was involved in a prior accident on September 21, 2006, two and one-half months before Tim was killed and was known to have other mechanical problems. Aff. Paul Longfield ¶¶ 6-10 (Sep. 19, 2009), attached to Br. Opposing Def.'s Mot. S.J. Causation (Oct. 6, 2009). Excerpt Depo. David Hardy 64:18-22 (May 29, 2009), attached to Br. Opposing Def.'s Mot. S.J. Causation (Oct. 6, 2009). Prior to Tim's death, FCP employees were jerry rigging the forklift to get it started which eliminated key safety features on the forklift. *Id.* 32:2-11.

At the time of his death, Tim was 42 years old and resided with his mother, Carol. Compl. ¶ 5 (Oct. 16, 2008), Ans. ¶ 5 (Nov. 12, 2008). Tim was not married

and did not have children. *Id.* At the time Tim was killed, he was earning an average weekly wage of \$655.91 or an average monthly wage of \$2,623.67 from FCP. Excerpt Depo. Hardy 39:6-23 (May 29, 2009), Ex. 9 attached to Walters' S.J. Br. (Aug. 27, 2009).

Carol is the Personal Representative of her son's estate. Aff. Carol Walters, ¶ 3 (Aug. 17, 2008), attached as Ex. 2 to Walters' S.J. Br. (Aug. 27, 2009).

At the time of his death, Tim resided with Carol and partially supported her. *Id.* ¶¶ 5-8. Tim provided Carol with groceries, gas for the electric generator, propane for the cook stove, gasoline for the vehicles and firewood for heating. *Id.* Tim also paid the phone bills and paid for repairs on all equipment necessary to run their household. *Id.* Tim also paid for oil changes and bought tires for the truck. *Id.* Further, Tim cut firewood, hauled drinking water, built and repaired fences, watered animals, hauled, stacked and split firewood, blew snow off the driveway, shoveled snow off the roof, cleaned the stovepipe and chimney, and performed other tasks for his mother, Carol. *Id.*

Tim's contribution to Carol's support amounted to \$981 per month or \$11,772 per year. *Id.* However, it did not amount to more than one-half of Carol's living expenses to qualify her as a "dependent" pursuant to § 39-71-116(4)(e), MCA. Compensation for Carol's loss was, therefore, severely limited under the statute at issue in this appeal, § 39-71-721 (4), MCA.

When Tim died, no wage loss benefits were received. Instead, Tim received burial expenses and Carol received a \$3,000 payment from FCP's workers compensation insurer. Aff. Carol Walters ¶ 4 (Aug. 17, 2008), attached as Ex. 2 to Walters' S.J. Br. (Aug. 27, 2009). Carol attached a copy of the letter she received from the workers' compensation insurer to her affidavit. *Id.* It states in part:

Dear Mrs. Walters:

The Montana Contractor's Compensation Fund (MCCF) is responsible for the adjustment of your son's claim. First, please accept our deepest sympathy for your family's loss. Second, this letter is to outline the benefits that you may be entitled to regarding Tim's death...then as the surviving parent of Tim you are entitled to benefits outlined in Section 39-71-721(4) of the Montana codes. This section states:

"If the decedent leaves no beneficiary, a lump-sum payment of \$3,000.00 must be paid to the decedent's surviving parent or parents."

Id.

SUMMARY OF ARGUMENT

The Workers' Compensation Act's exclusive remedy rule eliminates, in most circumstances, the right to pursue a civil claim for an employee's injury or death. The unique infringement of the right to seek relief in court has survived constitutional challenge because of the bargain that exists in the employment relationship governed by the Act, known as the *quid pro quo*. This compromise is incorporated into Article II § 16 of the Montana Constitution and is the *balance*

struck between the employer, who must provide medical *and* wage loss benefits for death or injury, which reasonably relate to the actual wages lost regardless of fault, and the employee, who gives up the right to sue for damages. If the quid pro quo does not exist, then the employee is not precluded from suing. In this case, the quid pro quo does not exist. There were no wage loss benefits paid to Tim after his death, so there was no quid pro quo between Tim and his employer.

Furthermore, § 39-71-741(4), MCA, which provides \$3,000 to the parent for the death of a worker is unconstitutional on its face and also violates the quid pro quo. Because there is no quid pro quo, the exclusive remedy rule, § 39-71-411, MCA, which precludes the civil claims of Tim and Carol, is unconstitutional as applied.

Alternatively, denying Carol and Tim the right to pursue their civil claims violates their rights to due process.

STATEMENT OF STANDARD OF REVIEW

The independence of the judiciary is absolute. Mont. Const. art. III, § 1; art. VII, § 1 (1972). Stated concisely, “the legislative branch makes the laws, the executive branch carries out the laws, and the judicial branch construes and interprets the laws.” *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, ¶ 21, 311 Mont. 194, 53 P.3d 1268. The free exercise of discretion, reasoning and judgment, without obedience to the authority of the other two

branches of government, is the characteristic which differentiates an independent judiciary from a body that is merely ministerial. *Carlson v. City of Bozeman*, 2001 MT 46, ¶¶ 27-29, 304 Mont. 277, 20 P.3d 792, 797.

The Montana Supreme Court's review of a district court's grant of summary judgment is *de novo*, applying the same criteria used by the district court pursuant to Mont. R. Civ. P. 56 (c). A district court may grant summary judgment only when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Emanuel v. Gt. Falls School Dist.*, 2009 MT 185, 351 Mont. 56, 209 P.3d 244 at ¶ 9.

A person making a challenge to a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt. *Eklund v. Wheatland County*, 2009 MT 231, ¶ 14, 351 Mont. 370, 212 P.3d 297. The constitutionality of a statute is a question of law and the Montana Supreme Court reviews a district court's application of the Constitution for correctness. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. The review of constitutional questions is plenary. *Id.*

ARGUMENT

I. The quid pro quo bargain, which is the constitutional basis for the Workers' Compensation Act, must exist and must be balanced. In this case, the quid pro quo is non-existent to Tim and so unfair to Carol that the employer's immunity from suit must fail.

Quid Pro Quo

Following the industrial revolution, Montana and other states created a workers' compensation system in response to increased social and economic problems resulting from the increasing number of work related injuries. The legislation survived constitutional challenge because of the bargain struck between the employer and employee, which became known as the quid pro quo. *New York Central R. R. Co. v. White*, 243 U.S. 188, 196-197 (1917).

Quid pro quo is defined in *Black's Law Dictionary* as "what for what; something for something. Used in law for the giving of one valuable thing for another." *Black's Law Dictionary* 1248 (Publisher's Editorial Staff ed., 6th ed., West 1990). The quid pro quo compromise embodied in workers' compensation is that the employer is entitled to a shield from tort actions and, in return, the employee is guaranteed medical and wage loss benefits regardless of fault.

In the premiere challenge to a workers' compensation act, the United States Supreme Court upheld its constitutionality in *New York Central R. R. Co.* against a challenge that the statutory scheme violated the Due Process clause of the United States Constitution. The question presented to the Court was whether the common law rules respecting the rights of the employer and employee may be altered by the legislature's enactment of a workers' compensation system and whether the act deprived the employee of due process of law. The Court determined that a

worker's such rights may be altered at least if some reasonably just substitute be provided. *Id.*

Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

243 U.S. at 253-254.

The Court reasoned that the loss of an employee from the workplace due to physical incapacity and death involves a loss arising out of the business and that it is not unreasonable for the State, while protecting the employer from common law actions, to require him to contribute a *reasonable amount, and according to a reasonable and definite scale*...243 U.S. at 203. The Court qualified its decision and went on to state that there must be *reasonable compensation* for the system to work.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

243 U. S. at 205-206.

Unlike this case, the reasonableness of the amount of compensation paid to the claimant in *New York Central R.R. Co.* was not being challenged. This case

presents questions of no compensation and insignificant compensation which concerned the United States Supreme Court in *New York Central R.R. Co.* Montana's original workers' compensation legislation survived a similar constitutional challenge in the landmark case *Shea v. North-Butte Mining Co.* (1919), 55 Mont. 522, 179 P. 499. Like this case, the challenge in *Shea* involved the constitutionality of the system which conflicted with the constitutional right to a speedy remedy for every injury. At the time, the employer and employee had the right to elect workers' compensation coverage. In *Shea*, the Court noted that, under the common law system, the employee was the victim of an employment-related injury. The Court stated:

In other words, the theory of such legislation is that loss occasioned by reason of injury to the employee shall not be borne by the employee alone, as it was under the common-law system, but directly by the industry itself, and indirectly by the public, just as is the deterioration of the buildings, machinery, and other appliances necessary to enable the employer to carry on the particular industry.

Id. at 501.

The Court also noted that the workers' compensation system was created by a persistent enlightened public opinion and was eminently just and humane. *Id.* According to the Court, it operated more justly than the old system, as demonstrated by the fact that the majority of employers and employees accepted the provisions of the act. *Id.*

As this Court pointed out in *Shea*, in reality the employee in 1919 had very little chance of succeeding in a common law action. Therefore, the employee in 1919 was giving up very little when electing coverage under the Workers' Compensation Act. What workers are giving up today - their right to proceed on a tort claim - is worth a great deal more than it was in 1919. The body of tort law certainly has evolved in favor of the plaintiff. Theodore F. Hass, *On Integrating Workers' Compensation and Employer's Liability*, 21 Ga. L. Rev. 843, 886-887 (1987).

These principles of a balanced quid pro quo articulated in *New York R.R. Co.*, and *Shea* have been expressly declared by the legislature to be the public policy underlying the Act:

(1) An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefits *should bear a reasonable relationship to actual wages* lost as a result of a work-related injury or disease.

Section 39-71-105 (1), MCA (emphasis added).

The Montana Constitution incorporates the quid pro quo:

Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. *No person shall be deprived of this full legal redress for injury incurred in employment for which another*

person may be liable except as to fellow employees and his immediate employer who hired him if such employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial or delay.

Mont. Const. art. II, § 16 (1972) (emphasis added).

The quid pro quo and Tim

Tim was killed performing his duties for FCP operating a dangerous piece of machinery in an unsafe work place. Tim's estate brought a survival claim against FCP for Tim's damages. Survival damages are personal to the decedent but pursued by the personal representative. *Hern v. Safeco Insurance Co.*, 2005 MT 201 ¶ 36, 239 Mont. 247, 125 P.3d 597. All the claims, including Tim's survival action, were dismissed because the district court determined that the exclusive remedy rule provides immunity to Tim's employer, FCP. Or. Cross Mot. S.J. (March 5, 2010). The exclusivity rule, § 39-71-411, MCA, provides:

[A]n employer is not subject to any liability whatsoever for the death of or personal injury to an employee *covered* by the Workers' Compensation Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of such injuries or death.

(emphasis added). The district court determined that, since the claims did not fall into the narrow exception to the exclusive remedy rule for intentionally injuring employees, embodied in § 39-71-411, MCA, Tim's claims were barred. Carol conceded she could not hurdle the high standard for an intentional claim but

requested that the district court analyze the claims in light of the Montana Constitution. The district court refused to do so because it found that “the Plaintiff did not have a constitutionally protected interest.” Or. Cross Mot. S.J. p. 6 (March 5, 2010). The district court was wrong because the interest involved is not only a constitutionally protected one but is a constitutional right – the right of access to the court for an injury as guaranteed by Article II, Section 16 of the Montana Constitution:

...No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such employer provides *coverage* under the Workmen’s Compensation Laws of this state.

Mont. Const. art. II, § 16 (emphasis added).

When Tim died, he suffered permanent wage loss. FCP did not provide any wage loss benefits to Tim’s estate and indeed the Act does not allow for *any* wage loss benefits for a person in Tim’s situation. The payment of zero for a life of earnings lost contravenes the quid pro quo and the public policy set forth in the Act. Because FCP provided no wage loss benefits whatsoever, it can not be immune from Tim’s survival action. In Tim’s case, the quid pro quo bargain that is the foundation for the Act does not exist.

This Court has mandated that without the quid pro quo, the employee must be allowed to bring his civil claims. *Stratemeyer v. Lincoln County* (1996), 276 Mont. 67, 915 P.2d 175 (*Stratemeyer II*).

The quid pro quo between employers and employees is central to the Act; thus, it is axiomatic that there must be some possibility of recovery by the employee for the compromise to hold . . .

By definition, the mental injury which Stratemeyer suffered is excluded from coverage under the Workers' Compensation Act. ...Accordingly, under Lincoln County's theory, employees would have no possibility of recovery for mental injuries and yet the employer would be shielded from all potential liability. If that were the case, the quid pro quo, which is the foundation of the exclusive remedy rule, would be eliminated. Such a result would be contrary to the spirit and intent of the Workers' Compensation Act. ...*Absent the quid pro quo, the exclusive remedy cannot stand, and the employer is thus exposed to potential tort liability.*

Id. at 76 (emphasis added).

Stratemeyer, a sheriff's deputy, sustained disabling post traumatic stress disorder (PTSD) as a result of his failed efforts to rescue a young suicide victim. His workers' compensation claim was denied because mental injuries are excluded from coverage in the definition of injury statute, § 39-71-119, MCA, which states in part: "Injury" or "injured" does not mean a physical or mental condition arising from emotional or mental stress." After he lost his claim for workers' compensation benefits, Stratemeyer filed a civil claim alleging negligence on behalf of his employer. The district court dismissed Stratemeyer's claim citing the

workers' compensation exclusive remedy rule. Stratemeyer appealed to this Court, which reversed holding that Stratemeyer could proceed with his civil claim for mental injury:

The exclusion of Stratemeyer's "mental-mental" injury leaves him without workers' compensation *coverage* and likewise removes Lincoln County's shield from a tort claim. Thus, in keeping with the quid pro quo of the Act, we hold that Stratemeyer is allowed to proceed in tort against his employer.

Stratemeyer, 276 Mont. 67, 915 P.2d 175 at 181-182 (internal citation omitted) (emphasis added).

In *Stratemeyer II*, this Court held that, when the quid pro quo is negated by legislation that wipes out coverage to the worker, the employer loses its immunity from suit. The exclusive remedy rule only applies when the worker is covered by the Act, which means coverage for medical benefits and wage loss. Section 39-71-105 (1), MCA. ("An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker...") In Tim's case there was no wage loss benefit paid although Tim suffered a complete wage loss. There is no coverage for Tim for his wage loss, so the quid pro quo does not exist and FCP is not immune from suit.

The quid pro quo & Carol

Carol brought a claim for Tim's wrongful death. Damages in a wrongful death may be given under all the circumstances of the case may be

just. Section 27-1-323, MCA. These damages include loss of comfort and society, reasonable value of contribution in money, sorrow, mental distress and grief. The district court relied on the exclusive remedy rule to dismiss Carol's claim. Again, the lower court did no analysis to the quid pro quo.

Families of workers are included in the quid pro quo bargain. The declaration of Montana's public policy states:

... A worker's removal from the workforce because of a work-related injury or disease has a negative impact on the worker, the *workers' family*, the employer, and the general public.

Section 39-71-105(3), MCA (emphasis added).

The Act also provides wage loss benefits for family members of deceased workers in some circumstances. In case of a worker's death, certain family members, as defined in § 39-71-116 (4) (a) through 4(f), MCA, are provided wage loss benefits. These wage loss benefits are calculated at two-thirds of the worker's wages up to the State's average weekly wage for 500 weeks or about ten years. Section 39-71-721, MCA.¹ But, the Act does not provide wage loss benefits to a single person with no children, like Tim. Instead, \$3,000 is paid to the worker's surviving parent or parents. Section 39-71-721 (4), MCA states: "If the decedent leaves no

¹ In Tim's case, this would mean 500 weeks at 2/3rds of his average weekly wage of \$437.49 or approximately \$218,748.

beneficiary, a lump-sum payment of \$3,000 must be paid to the decedent's surviving parent or parents.”

This small amount paid to Carol for her son's death presents a slightly different question than the one raised in *Stratemeyer II*. Does the employer enjoy immunity from suit no matter how unreasonable the price paid? The United States Supreme Court predicted this question in 1917:

In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. *Any question of that kind may be met when it arises.*

New York Central R.R. Co., 243 U.S. at 206 (1917) (emphasis added).

As noted by the United States Supreme Court in *New York Central R.R. Co.*, the compensation provided to the worker must be just. *New York Central R.R. Co.* at 205. (“This, of course is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable.”) In this case, the death benefit is so low that it “raises the specter of whether the workers’ compensation scheme provides an adequate substitute remedy “for that which might be available in the tort system for such an injury.” *Satterlee v. Lumberman’s Mutual Ins. Co.*, 2009 MT 38, ¶ 55, 353 Mont. 265, 222 P.3d 566 (Justice Morris’ Dissent) (quoting *West Virginia v. Richardson*, 482 S.E. 2d 162, 168, (W.Va. 1996)).

A historical review of § 39-71-721(4), MCA reveals that the Montana Legislature enacted the “parents” \$3,000 death benefit in 1957 through H.B. 324. In 2009, 52 years later, the death benefit is still only \$3,000.² The amount paid for the death of Tim Walters was far less than the price of most equipment any employer would need to run an office or to conduct most types of businesses. Three thousand dollars is less than one-half of the \$7,000 jurisdictional limit for justice of the peace courts, § 3-10-101, MCA, and is the jurisdictional amount for “small claims.” Three thousand dollars is far less than a home, a car or the price of a good ticket to the NCAA final four. And, in this case, \$3,000 is a little more than one-quarter of the support provided by Tim to his mother Carol each and every year. Obviously, the “bargain” is not fair and balanced.

Professor Larson also supports the theory that when the benefit is not valuable, the exclusive remedy protection for the employer should be vitiated:

If...the exclusiveness defense is a “part of the quid pro quo by which the sacrifices and gains of employees and employers are to some extent put in balance,” it ought logically to follow that the employer should be spared damage liability only when compensation liability has been provided in its place, or, to state the matter from the

² In the legislative history for the enactment of \$3,000 in 1957, it is notable that most of the other benefits enacted during that time have greatly increased and are related to a percentage of the worker’s wages subject to the state’s maximum weekly wage set forth by the Employment Relations Division of the Montana Department of Labor. For instance, in 1957 the maximum temporary total disability benefit rate for a single worker was \$28 per week. *See* Exhibit #1. In comparison, the state’s average weekly wage effective July 1, 2010 is \$633 and the percentage increase from \$626 (last year’s average weekly wage) to \$633 is 1.12%. *See* Exhibit #2.

employee's point of view, rights of action for damages should not be deemed taken away except where something of value has been put in their place.

Arthur Larson, *Larson's Workers' Compensation Law* vol. 6, § 100.04

(LexisNexis 2008). (emphasis added).

Accordingly, there is no genuine issue of material fact that there is no quid pro quo, and the district court should be reversed.

II. Alternatively, denying Carol and Tim the right to pursue their civil claims violates their rights to due process.

“No person shall be denied of life, liberty, or property without due process of law.” Mont. Const. art. II, § 17 (1972). This guarantee of due process not only imposes standards of fairness in governmental procedures, but also contains a substantive component. *Newville v. State Dept. of Family Services* (1994), 267 Mont. 237, 249, 883 P.2d 793, 800.

High level of scrutiny

A high level of scrutiny is necessary in this case because as stated by Justice Nelson in his concurring opinion in *Kloss*, the right of access to the Court is a fundamental right. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129 ¶ 52, 210 Mont. 123, 54 P.3d 1. (Justice Nelson concurrence.) This Court should cast a strict eye on any legislation that would interfere with a fundamental right. Therefore, a high level of scrutiny should be applied in this case.

The Montana Constitution provides:

Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable *except as to fellow employees and his immediate employer who hired him* if such employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial or delay.

Mont. Const. art. II, § 16 (1972) (emphasis added).

This provision is mandatory, leaves no room for erosion and is self-executing. *Oberson v. Federated Mutual Insurance Co.*, 2005 MT 329, ¶ 15, 330 Mont. 1, 126 P.3d 459; *Schuff v. A.T. Klemens and Son*, 2000 MT 357, ¶ 95, 303 Mont. 274, 16 P.3d 100. (Full Legal Redress provisions of Article II, § 16 are mandatory and self-executing.) Despite language to the contrary in *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 776 P.2d 488, the right of access to the court is a fundamental right. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1. (Justice Nelson concurrence.)

In *Kloss*, Justice Nelson stated:

...I next turn to Article II of Montana's Constitution. The rights included within this "Declaration of Rights" are "fundamental rights." *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311; *Wadsworth v. State* (1996), 275 Mont. 287, 299, 911 P.2d 1165, 1172; *State v. Tapsen*, 2001 MT 292, ¶ 15, 307 Mont. 428, ¶ 15, 41 P.3d 305, ¶ 15. That means that these rights are significant components of liberty, see *Black's Law Dictionary*, 7th Edition, p. 683, any infringement of which will trigger the highest level of

scrutiny, and, thus, the highest level of protection by the courts....(citations omitted)...

Kloss, ¶ 52.

FCP relies upon *Meech, supra*, for the proposition that the right of access to the Court is not a fundamental right and therefore, it is acceptable for the legislature to reduce or eliminate the benefit now provided in § 39-71-724(4). *See* Br. Opposition Pl.'s Mot. P.S.J. (Oct. 2, 2009). ("Indeed, it would be constitutional for the Legislature to refuse to provide any benefits to non-dependent parents.") *Meech* did not involve a constitutionally mandated quid pro quo so it is distinguishable. Further, as noted by Justice Nelson in *Kloss*, to the extent this Court has held that the right of access to the Court is not a fundamental right, the decisions should be overruled. *Id.* ¶59.

Lower level scrutiny

Even under a lower level of scrutiny, Carol is able to prove that the statutes at issue violate due process.

A legislative body cannot abrogate constitutional rights by enacting a law or statute. *First Bank (N.A.)–Billings v. Transamerica Ins. Co.* (1984), 209 Mont. 93, 96, 679 P.2d 217, 1219. The Montana Constitution is a limitation on the power of the legislature. *Armstrong v. State*, 1999 MT 261, ¶ 61, 296 Mont. 361, 989 P.2d 364. While the legislature is free to pass laws implementing provisions of the

Constitution, its interpretations and restrictions may not be elevated over the Constitution. *In re Lacy* (1989), 239 Mont. 321, 325, 780 P.2d 1986, 1987.

To satisfy substantive due process concerns, “a statute enacted by the legislature must be reasonably related to a permissible legislative objective.” *Plumb v. Fourth Judicial District* (1996), 27 Mont. 363, 372, 927 P.2d 1011, 1016, citing *Newville*, 883 P.2d at 803. Looking at some of the legislative objectives set forth in the public policy provisions established by the Montana legislature, it is difficult to conceive of a permissible objective in providing that, in the event a worker dies without a spouse or dependents, his death is worth \$3,000.

A. Zero and the \$3,000 death benefit bear no relationship to the actual wages lost, let alone a reasonable relationship.

The declaration of public policy in the State of Montana is clear:

It is an objective of the Montana workers’ compensation system to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a *reasonable relationship to actual wages lost* as a result of a work-related injury or disease.

See § 39-71-105(1), MCA (emphasis added). Tim received nothing for his wage loss. Carol received a \$3,000 death benefit provided by § 39-71-721(4), MCA, which is an arbitrary amount. Three thousand dollars does not bear a

reasonable relationship to the actual wages lost as a result of Tim's death. There is no correlation whatsoever. The amount is arbitrary and unreasonable.

Damages in a survival action include lost earnings from time of injury to death, present value of reasonable earnings during life expectancy, medical and funeral expenses, pain and suffering and other special damages. *Swanson v. Champion Intern. Corp.* (1982), 197 Mont. 509, 515, 646 P.2d 1166. Minimally, Tim's estate would have been entitled to his lost earnings through this survival claim. Tim earned \$31,484 annually at the time of his death. Presumably, Tim would have earned at least that amount until he was 67, or for the next 25 years. The non-discounted total of this one damage component alone is \$787,101. The amounts actually paid for Tim's death pursuant to the Act do not even amount to two months of work, let alone what he would have earned over the course of his work life.

The failure to live up to the promise to provide a wage-loss benefit that would bear a reasonable relationship to actual wages lost violates Montana's public policy as set forth in The Workers' Compensation Act and violates due process.

B. Zero and the \$3,000 death benefit bear no reasonable relationship to Montana's public policy of promoting safety in the work place.

The sum provided in the event of a worker's death, like Tim's, also violates the public policy set forth in the Montana Safety Act, requiring that Montana employers do whatever is reasonably necessary to make the work place safe. Section 50-71-201(1), MCA. Montana has the distinction of ranking near the top in the nation year after year in employee work place deaths. In 2003, Montana was ranked 48th out of 50 in the nation for most fatalities in its workforce per 100,000 workers. See Exhibit #3, Bureau of Labor Statistics. In 2005, Montana was ranked 50th. In 2006, Montana was ranked 47th and in 2007 Montana was back up to 49th, beating out all states except Wyoming for the most fatalities. Looking at what it costs when an employee like Tim Walters dies; it is no wonder Montana has the distinction of being one of the most unsafe places to work. It is analogous to the \$5.00 fine we all used to pay for speeding on the interstate back in the day when \$5.00 was the fine. Why not pay the fine? It was worth it to speed. With the cost of Tim's death at \$3,000, it is worth it to kill.

In the final analysis, the Act is only viable if it is fair. The Constitution mandates fairness. The provision that provides \$3,000 for a work related death is not fair to the employee who gives up his life and his right to sue for negligence causing his death at common law. Substantive due process prohibits the state from taking unreasonable, arbitrary or capricious action. *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶35, 315 Mont. 107, 67 P.3d 892.

CONCLUSION

The bargain that is the foundation for the Workers' Compensation Act is non-existent to Tim and unfair to Carol. There is no quid pro quo to Tim and Carol and so the exclusive remedy rule cannot stand. Further, paying \$3,000 when a worker dies and no wage loss benefits is unreasonable and violates due process. Therefore, Carol respectfully requests that this Court reverse the lower court and allow the civil claims to proceed.

DATED this 22nd day of June 2010.

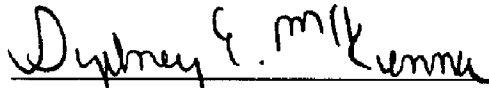
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman Text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word 2007 is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Dated this 22nd day of June 2010.



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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 22 day of June 2010, I mailed a true and correct copy of Appellant's Brief by U.S. Mail, first class, postage prepaid to the following person:

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